

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHN E. HUMBOLT)	
Claimant)	
VS.)	
)	
HILAND DAIRY COMPANY)	Docket Nos. 228,849
Respondent)	& 228,850
AND)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals the July 26, 1999, consolidated Award of Administrative Law Judge Jon L. Frobish. Claimant was awarded an 8 percent impairment to his right foot in Docket No. 228,849 and a 5 percent impairment to the right upper extremity at the shoulder in Docket No. 228,850. Claimant contends he should be entitled to a permanent partial general disability, including a work disability under K.S.A. 1996 Supp. 44-510e, in Docket No. 228,849, arguing that he also suffered an injury to his back. Oral argument was held on December 10, 1999.

APPEARANCES

Claimant appeared by his attorney, Alexander B. Mitchell, II, of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Jeffery R. Brewer of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations set forth in the Award of Administrative Law Judge are adopted by the Appeals Board for the purposes of this award.

At oral argument, respondent's attorney acknowledged that several of the bills listed in claimant's submission letter deal with treatment for claimant's shoulder and claimant's foot. Therefore, as the shoulder and foot injuries are not disputed by respondent, any medical expenses associated with examination and/or treatment of the shoulder and foot

injuries, including unauthorized medical benefits already ordered, are ordered paid by respondent.

ISSUES

- (1) What is the nature and extent of claimant's injury and/or disability?
- (2) Did the Administrative Law Judge err in not awarding payment of certain medical expenses listed in claimant's submission letter?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file herein, the Appeals Board makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

Claimant began working for respondent as temporary help in 1994. Shortly thereafter, claimant was hired full-time, working in respondent's cooler. By 1996, claimant was working primarily as a cheese cook. However, on December 1, 1996, claimant was asked by a supervisor to help in the cooler, loading trucks. While working in the cooler, a dock plate, weighing approximately 100 pounds, fell on claimant's right foot. Claimant was treated with ice and returned to work as a cheese cook. Claimant's foot gradually improved, and he did not seek additional medical treatment.

On July 20, 1997, claimant bid to a job in the cooler, which required that he wear different boots. Shortly after claimant was provided the boots on July 22, 1997, his right foot began to swell and he began to experience pain. Claimant went to the emergency room and was later referred to Frank K. Galbraith, D.P.M. Dr. Galbraith took x-rays of claimant's foot and diagnosed bunions and a fracture of the first metatarsal in the right foot. Dr. Galbraith performed a bunionectomy and a repair of the fracture, and claimant was released to return to work on October 22, 1997. Claimant worked the entire day on October 22, 1997, and the following day, October 23, 1997. However, during these full work days, claimant's right shoulder began hurting and he noted swelling in his right arm while stacking bags of Dairy Queen products. Claimant reported the shoulder complaints to his supervisor and was again referred to the emergency room. He later followed up with Dr. Galbraith and was provided pain medication for his foot.

Early in his life, claimant came under the care and treatment of family practitioner Terry Summerhouse, D.O., an osteopath in Wichita, Kansas. However, Dr. Summerhouse

relocated his office sometime before 1997, and the earliest available medical records on claimant are from September 25, 1997. At that time, claimant appeared in Dr. Summerhouse's office complaining of stomach pain, back pain and foot pain secondary to being struck by a car on September 8, 1997. He diagnosed claimant with sprains in the neck and upper back. By October 2, 1997, claimant's complaints had spread to his low back. Dr. Summerhouse treated claimant with physical therapy and pain medication. On November 14, 1997, claimant came to Dr. Summerhouse, complaining of right shoulder pain. At that time, Dr. Summerhouse's notes indicated claimant had been struck by the police, but no additional explanation was contained in Dr. Summerhouse's records, and no additional explanation was contained in the record about this incident.

Dr. Summerhouse did order an MRI which disclosed degenerative disc problems at L2-3. In January of 1998, claimant was released from Dr. Summerhouse's care for this automobile accident.

Claimant returned on February 2, 1998, complaining of a sore back, tight muscles, a limited range of motion and chronic intractable back pain. Claimant was requesting additional pain medication. Dr. Summerhouse, at that time, expressed concern about claimant's request for additional narcotic medication and recommended, instead, a TENS unit. He also changed claimant's pain medication from Lortab to Ultram. Dr. Summerhouse continued treating claimant with hot packs, traction and pain relievers.

While claimant was being treated by Dr. Summerhouse, he was also being treated by Michael Estivo, D.O., an orthopedic surgeon in Wichita, Kansas. Dr. Estivo saw claimant on November 17, 1997, with complaints of right shoulder and right foot pain. Dr. Estivo noted the fractured metatarsal in claimant's right foot. X-rays of claimant's right shoulder indicated rotator cuff weakness, but no gross instability was appreciated. Dr. Estivo found claimant to have neurovascular function in the right upper extremity, with no atrophy. An MRI of the right shoulder indicated no rotator cuff tear. But there was indication of impingement syndrome in the right shoulder. Dr. Estivo recommended an injection in the shoulder, but claimant received no significant relief from the injection. Dr. Estivo then recommended an acromioplasty, but claimant elected to forgo the surgery.

In the January 9, 1998, visit, claimant first complained of low back pain, advising Dr. Estivo that the back pain had been present since September 1997. While claimant did not mention the automobile accident to Dr. Estivo, the date of first complaints does coincide with the date claimant was struck by the automobile.

An MRI of claimant's lumbar spine indicated degenerative disc disease at L1-2. Claimant also alleged that he developed an altered gait as a result of his preexisting foot problem, causing his back to hurt.

As claimant had declined the surgery on his shoulder, Dr. Estivo recommended continuing exercises at home and a functional capacity evaluation. The functional capacity evaluation, performed in January 1998, was deemed invalid due to submaximal effort on claimant's part. Claimant alleged that the submaximal effort was a result of his high blood pressure but, when Dr. Estivo recommended that his blood pressure be tested, claimant refused.

Claimant underwent a second functional capacity evaluation in March 1998 which returned an 82 percent validity profile, indicating a good effort on claimant's part.

Dr. Estivo diagnosed impingement syndrome in the right shoulder, degenerative disc disease at L1-2 and right foot pain associated with the fracture.

When asked about claimant's foot and any connection to the back, Dr. Estivo testified that an altered gait could lead to back symptoms, especially if claimant's altered gait existed over a several-month period. However, on cross-examination, Dr. Estivo acknowledged that, during the time he treated claimant, he at no time observed an altered gait. Claimant did not walk with a limp and, until January 1998, did not complain of low back pain.

Dr. Summerhouse, who treated claimant since before 1997, also acknowledged that claimant, at no time, exhibited an altered gait. He also testified that the first complaints of low back pain from claimant were secondary to when he was struck by the automobile.

Claimant was examined by Philip R. Mills, M.D., board certified in physical medicine and rehabilitation, at the request of respondent's attorney on April 1, 1999. At that time, claimant was complaining of right shoulder pain, right foot pain and low back pain. Dr. Mills noted claimant did not have a limp, although claimant told the doctor that he would, at times towards the end of the day, begin limping. Dr. Mills reviewed the x-rays from Wesley Medical Center from September 1997 and found no abnormalities. Dr. Mills did acknowledge that the foot surgery performed on claimant could result in a limp, although he had never seen claimant limp.

On July 1, 1998, at the request of his attorney, claimant was examined by Anthony G. A. Pollock, M.D., a board certified orthopedic surgeon. Dr. Pollock found claimant to have a normal range of motion in the shoulder with complaints of pain. He did acknowledge some signs of impingement syndrome in the right shoulder at the time of the examination. The examination of claimant's back indicated no significant problems. He also found claimant to be recovered from the foot surgery. Dr. Pollock was advised by claimant that the automobile accident resulted when claimant's father-in-law backed over his right foot and struck him in the stomach with the automobile.

Dr. Pollock testified the injury with the dock plate did not cause claimant's bunions, but could be related to a worsening of his condition. Dr. Pollock was also asked whether he had observed claimant walking with an altered gait. The doctor testified that he had not, at any time, seen claimant limping or walking with an altered gait. He did find, in reviewing the functional capacity evaluations, that there was a significant indication of symptom magnification from the early functional capacity evaluation. This symptom magnification was not present during the later functional capacity evaluation report, which he felt was a contradiction.

With the exception of the degenerative disc disease at L1-2, which he saw in the MRI, Dr. Pollock found nothing significant associated with claimant's low back. He found no objective evidence of any lumbar impairment, although he did not disagree with Dr. Estivo's assessment of a 3 percent impairment to claimant's low back. With the exception of his comment about Dr. Estivo's 3 percent impairment to claimant's low back, Dr. Pollock provided no functional impairment.

Dr. Estivo also found that claimant had a 6 percent impairment to the right foot, which converts to a 4 percent impairment to the right lower extremity and a 2 percent impairment to whole body. Dr. Estivo gave claimant a 3 percent permanent partial impairment to the right shoulder, which converts to a 2 percent whole body impairment. He also found claimant had a 3 percent whole body impairment to the lumbar spine, which, when combined, results in a 7 percent whole body functional impairment.

Dr. Mills opined claimant had a 5 percent impairment to the right upper extremity and a 6 percent permanent partial impairment to the right lower extremity. Dr. Mills found claimant had no permanent impairment to the low back. He did not find claimant had suffered any additional impairment to his preexisting low back problems as a result of the injury to the foot.

CONCLUSIONS OF LAW

In proceedings under the Workers Compensation Act, it is claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence. See K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g).

In this instance, the Administrative Law Judge awarded claimant benefits for a scheduled injury to the foot and a scheduled injury to the right shoulder. Benefits were denied claimant for the alleged injuries to his back, as the Administrative Law Judge found that claimant had failed to prove any additional impairment to the back resulting from his work-related injuries. The Administrative Law Judge found it significant that none of the physicians who treated claimant observed an altered gait in claimant. In addition, Dr. Pollock considered claimant to be a symptom magnifier. Claimant also failed a functional capacity evaluation as a result of lack of effort. Claimant attempted to blame this

failure on his high blood pressure but, when offered treatment for the high blood pressure through Dr. Estivo, claimant declined. It is significant that the first back complaints registered by claimant occurred in September 1997, shortly after claimant was struck by an automobile being driven by his father-in-law. Claimant advised Dr. Summerhouse initially that his low back complaints occurred as a result of this automobile accident.

When claimant told Dr. Estivo of the back complaints, he noted that they first began in September 1997. While claimant did not specifically advise Dr. Estivo that he had been struck by a car, the timing of his back complaints does coincide with the automobile accident.

The Appeals Board finds that claimant has failed to prove that he suffered any accidental injury or aggravation to his low back as a result of the injury to his foot on December 1, 1996, or the injury to his shoulder on October 23, 1997.

Approximately \$9,400 in medical bills were attached to claimant's submission letter, but were not discussed by the Administrative Law Judge. At oral argument, the parties agreed that any treatment related to claimant's right shoulder and right foot would be authorized treatment and would be compensable. In reviewing the medical expense list presented by claimant, the Appeals Board notes several of the entries are clearly related to claimant's foot and shoulder injuries. The Appeals Board cannot deduce from the record whether the remaining entries are related to claimant's foot injury, his shoulder injury or his low back injury. However, as the back was found to not have arisen out of and in the course of claimant's employment, any treatment associated with the back would not be the responsibility of respondent or its insurance carrier. Any treatment related to claimant's right foot or right shoulder shall be considered authorized medical care and ordered paid by respondent and its insurance carrier. The \$300 unauthorized medical expense, paid to Dr. Pollock for his independent medical examination, is proper and is ordered paid as an unauthorized medical expense.

The Administrative Law Judge awarded claimant an 8 percent impairment to the right foot and a 5 percent impairment the right upper extremity at the shoulder based upon the opinions of Dr. Mills. The Appeals Board finds the opinion of Dr. Mills, regarding claimant's functional impairment, is the most credible in the record. Therefore, the Appeals Board affirms the Administrative Law Judge's award, in Docket No. 228,849, for an 8 percent impairment to the right foot and, in Docket No. 228,850, for a 5 percent impairment to the right upper extremity at the shoulder.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board an award of compensation is hereby made in favor of the claimant, John E. Humbolt, and against the respondent, Hiland Dairy Company, and its insurance carrier, Old Republic Insurance Company, for an accidental injury sustained on December 1, 1996, to claimant's right foot and an accidental injury sustained on October 23, 1997, to claimant's right shoulder.

In Docket No. 228,849, claimant is entitled to 12.14 weeks temporary total disability compensation at the rate of \$338 per week totaling \$4,103.32, followed by 9.03 weeks permanent partial disability compensation at the rate of \$338 per week totaling \$3,052.14, for an 8 percent permanent partial scheduled injury to the right foot, making a total award of \$7,155.46. As of the time of this award, the entire amount is due and owing and ordered paid in one lump sum minus any amounts previously paid.

In Docket No. 228,850, claimant is entitled to 14.57 weeks temporary total disability compensation at the rate of \$351 per week totaling \$5,114.07, followed by 10.52 weeks permanent partial disability compensation at the rate of \$351 per week totaling \$3,692.52, for a 5 percent permanent partial disability to the right upper extremity at the shoulder, making a total award of \$8,806.59. As of the time of this award, the entire amount is due and owing and ordered paid in one lump sum minus any amounts previously paid.

Pursuant to the above order, claimant is entitled to unauthorized medical up to the statutory maximum upon presentation of an itemized statement verifying same.

Future medical may be awarded upon proper application to and approval by the Director of Workers Compensation.

Claimant's attorney fee contract is approved insofar as it does not contravene the applicable version of K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Barber & Associates	
Transcript of preliminary hearing (Docket No. 228,849)	\$119.20
Transcript of preliminary hearing (Docket No. 228,850)	\$107.10
Deposition of Michael Estivo, D.O.	\$261.20
Deposition of Jerry D. Hardin	\$192.80
Deposition of Terry Summerhouse, D.O.	\$162.00
Deposition of Anthony G.A. Pollock, M.D.	\$120.00

Deposition Services

Transcript of regular hearing	\$208.50
Bannon & Associates Deposition of Philip Roderick Mills, M.D.	\$127.50
Ireland Court Reporting Transcript of continuation of regular hearing	\$ 87.30

IT IS SO ORDERED.

Dated this ____ day of March 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Alexander B. Mitchell, II, Wichita, KS
Jeffery R. Brewer, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director